IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 02-1135 (and consolidated cases Nos. 03-1219, 06-1215, and 07-1201)

EPA RESPONSE TO PETITIONS FOR REHEARING *EN BANC*

Pursuant to the Court's April 9, 2009, Order, Respondent the United States Environmental Protection Agency ("EPA") files this response to the petitions for rehearing *en banc*. In its December 8, 2008, opinion, the Panel held that the 1994 exemptions for startup, shutdown, and malfunction ("SSM") events contained in 40 C.F.R. sections 63.6(f)(1) and (h)(1) were constructively reopened by the 2002, 2004, and 2006 rules challenged in these consolidated petitions for review, and the Panel vacated those exemptions because they violate section 112(d) of the Clean Air Act, 42 U.S.C. § 7412(d). As explained below, EPA does not believe the decision meets this Court's standards for rehearing *en banc*.

BACKGROUND

The Panel found that it had jurisdiction to consider the exemptions in 40 C.F.R. sections 63.6(f)(1) and (h)(1) because those regulations were "constructively reopened" by EPA's revisions to the requirements in 40 C.F.R. § 63.6(e) for SSM plans. The Panel reasoned that the SSM plan requirements are so inextricably linked to the SSM exemptions that EPA's extensive alterations to the

SSM plan requirements "eliminated the only effective constraints that EPA originally placed on the SSM exemption," which "changed the calculus for petitioners in seeking judicial review." *Sierra Club v. EPA*, 551 F.3d 1019, 1025-26 (D.C. Cir. 2008).

Turning to the merits, the Panel found that although sections 112 and 302(k) of the Clean Air Act, 42 U.S.C. §§ 7412, 7602(k), do not require emission standards that are unchanging, those sections do require emission standards that continuously satisfy section 112(d)'s minimum levels of stringency. *Id.* at 1027. The Panel held that because the general duty to minimize emissions is the only standard that applies during SSM events, and because the general duty does not comply with section 112(d), "the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously." *Id.* at 1028. The Panel therefore vacated sections 63.6(f)(1) and (h)(1), and did not reach Petitioners' other arguments concerning the legality of the requirements that do apply during SSM periods.

A group of intervenors has jointly filed a petition for panel rehearing and for rehearing *en banc* ("Respondent-Intervenors' Pet."), and intervenor the National Environmental Development Association's Clean Air Project separately seeks rehearing *en banc* ("NEDA-CAP's Pet."). On April 9, 2009, the Court ordered Sierra Club and EPA to file responses to the petitions for rehearing *en banc*.

STANDARD FOR REHEARING

Under Fed. R. App. P. 35, a case may be suitable for rehearing *en banc* if (1) it is in conflict with a decision of the Supreme Court or with another decision

of this Circuit and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions, or (2) it involves a question of exceptional importance.

ARGUMENT

A. The Court's Jurisdiction

Respondent-Intervenors and NEDA-CAP (collectively "intervenors") both assert that the Panel's decision conflicts with *Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). Respondent-Intervenors' Pet. at 7-9; NEDA-CAP's Pet. at 7-10. In *Kennecott*, the Court was faced with multiple challenges to natural resource damage assessment regulations issued by the U.S. Department of the Interior ("DOI") in 1994. A 1986 version of those regulations had been remanded in a prior case, *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989), and DOI argued that six of the challenges brought by the *Kennecott* petitioners were time-barred because they challenged regulations that were adopted in 1986, were not challenged in the *Ohio* case, and were not revised in 1994. 88 F.3d at 1199-1202, 1213. The *Kennecott* Court held that although one of the challenged regulations, 43 C.F.R. § 11.15(a), was not directly reopened in the 1994 rulemaking, it was constructively reopened by changes made in 1994 to 43 C.F.R. §§ 11.80-11.84, which section 11.15(a) incorporates by reference. *Id.* at 1226. Those changes made sections 11.80 to 11.84 "potentially more onerous," which "significantly alter[ed] the stakes of judicial review" of section 11.15(a). *Id.* at 1227.

Intervenors assert that a petition for review of the 1994 SSM regulations put Sierra Club on notice that a change in the SSM regulations might alter their incentive to seek judicial review. Respondent-Intervenors' Pet. at 8; NEDA-CAP's Pet. at 9. The *Kennecott* Court did state that a regulation is not constructively reopened if, as a result of a petition for review of the original regulation, a party had adequate notice of a forthcoming change in that regulation that might alter its incentive to seek review. 88 F.3d at 1214-15. However, in *Kennecott* the Court found that, despite a prior petition for review of portions of sections 11.80 to 11.84, changes in 1994 that made those sections "potentially more onerous" nonetheless constructively reopened section 11.15(a), suggesting that a prior petition for review does not necessarily defeat a constructive reopener argument. *Id.* at 1215. *See also Ohio*, 880 F.2d at 461-64 (reviewing sections 11.83 and 11.84 and remanding section 11.83(c)(1) on the basis that calculating use value based on market value alone was not reasonable). Although the Panel did not cite the *Kennecott* opinion's discussion of the impact of a prior petition, the result in this case (a constructive reopening of 40 C.F.R. §§ 63.6(f)(1) and (h)(1) based on changes to 40 C.F.R. § 63.6(e)) does not appear to conflict with *Kennecott*.

Intervenors also assert, as Judge Randolph noted in his dissent in this case, *Sierra Club*, 551 F.3d at 1029, that the constructive reopener doctrine has previously only been successfully invoked by regulated entities, for whom the incentives to challenge could be objectively determined. Respondent-Intervenors' Pet. at 8; NEDA-CAP's Pet. at 8-9. However, the *Kennecott* decision does not

necessarily turn on the objective versus the subjective state of mind of the challenging party. In *Kennecott* the Court held that the incorporation by reference of "new and potentially more onerous provisions" into a regulation constructively reopens that regulation. 88 F.3d at 1227. Here, the new SSM plan provisions are "potentially more onerous" to environmental groups, because the new provisions make it more difficult for such entities to obtain SSM plans, and because there is no requirement that plans be implemented or incorporated by reference into a source's Title V permit.

Therefore, the Panel's analysis of its jurisdiction does not conflict with *Kennecott*, and thus does not meet the standards for rehearing *en banc*.

B. The Merits

On the merits, Respondent-Intervenors argue that the Panel erred in discussing the relationship between CAA sections 112(d) and 112(h), 42 U.S.C. §§ 7412(d), (h). Respondent-Intervenors' Pet. at 10-11. Specifically, Respondent-Intervenors characterize the decision as holding that the general duty to minimize emissions during SSM periods does not comply with section 112 because EPA can "only issue non-numerical limits under section 112(h) and it had not provided in the record justification that the requirements under that subsection were met." *Id.* at 10. However, as the Panel noted in the opinion, "EPA has not purported to act under section 112(h)." 551 F.3d at 1028. Respondent-Intervenors dispute this statement, citing a single page in a lengthy background document prepared for the 1994 rulemaking. Respondent-Intervenors' Pet. at 11 & n.4. This passing reference to section 112(h) does not show EPA's reliance on that section as

authority for the duty to minimize emissions. Therefore, the Panel's characterization of section 112(h) and what it requires or allows is *dicta*, and disagreements over that characterization do not merit rehearing *en banc*.[1/]

C. The Remedy

The intervenors argue that the Panel should have simply remanded the exemptions in 40 C.F.R. sections 63.6(f)(1) and (h)(1) rather than vacating those provisions. Respondent-Intervenors' Pet. at 11-15; NEDA-CAP's Pet. at 15, n.5. Remand without vacatur is commonly ordered in cases where an agency fails to provide an adequate explanation for its action. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 462-66 (D.C. Cir. 1994) (failure to provide an adequate explanation does not necessarily mean that the agency has acted illegally, and the court therefore has the discretion not to vacate the agency action pending the agency's elaboration of its reasoning). Respondent-Intervenors claim that this is such an "inadequate explanation" case, and that the Panel's opinion leaves open the possibility that EPA "may be able to explain on remand how the SSM exemption complies with the CAA." Respondent-Intervenors' Pet. at 11. Here, however, the Panel did not find EPA's explanation was inadequate. Instead, the Panel held that,

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[1/] Because section 112(h) work practice standards for major sources must meet the stringency requirements of section 112(d)(2) and (d)(3), *see* 42 U.S.C § 7412(h)(1) (requiring that 112(h) standards be consistent with 112(d)), EPA agrees with Respondent-Intervenors, Respondent-Intervenors' Pet. at 11 n.3, that the Panel mischaracterized section 112(h) as "providing that a standard may be relaxed." *See* 551 F.3d at 1028.

under *Chevron* step one,[2] the "plain text of section 112" requires not just a continuous limitation but a limitation that continuously complies with section 112(d)'s requirements. 551 F.3d at 1027-28.

When this Court chooses to remand an agency action without also vacating that action, it considers "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *International Union, United Mine Workers of Am. v. Federal Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990); *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Both petitions for rehearing focus on the second prong, asserting "severe disruption to EPA's MACT program and to the regulated community." Respondent-Intervenors' Pet. at 12. However, industry's claims about the impact of the decision are overstated.

First, the vacatur immediately and directly affects only the subset of section 112(d) standards that incorporate 40 C.F.R. sections 63.6(f)(1) and (h)(1) by reference, and that contain no other regulatory text exempting or excusing SSM events. In contrast, many section 112(d) standards include their own provisions addressing the source's obligation to comply with section 112(d) standards during SSM events. The vacatur does not have a direct impact on such source category-specific SSM provisions because those provisions were not challenged and were not before the Panel. However, EPA recognizes that those provisions may now be

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[2] *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984).

called into question, and EPA intends to evaluate them in light of the Panel's decision.[3/]

Second, even for sources for which the section 112(d) standards do no more than incorporate by reference sections 63.6(f)(1) and (h)(1), the impact of the decision will vary depending on the source category, and may not be immediate for many sources. Some of the section 112(d) standards apply to source types that can achieve the standard despite SSM events, either because the performance of pollution control equipment is not affected by SSM events or because the standard is expressed as an average over a relatively long period of time (*e.g.*, yearly rolling average) and expected startup and shutdown events and any malfunctions over that period are not likely to result in an exceedance of the standard. Other section 112(d) standards impose work practice requirements with which a source should be able to comply during SSM events. In addition, at least some sources should be able to minimize their exposure to violations of the applicable standards by adjusting their operating practices or adding emission controls or measures, to

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[3/] Intervenors raise the specter that the Panel's decision will serve as grounds arising after the 60-day period for judicial review of existing section 112(d) standards has expired, thus allowing industry groups to challenge many such standards under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Respondent-Intervenors' Pet. at 12-13; *see also* NEDA-CAP's Pet. at 11-12. However, the proper approach for challenging existing section 112(d) standards is to petition EPA to revise the particular standards that a party believes are now infirm, and then seek judicial review if unsatisfied with EPA's resulting decision. *See, e.g., Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666-67 (D.C. Cir. 1975) (requests to reconsider CAA emission standards based on changed conditions must first be presented to EPA).

reduce or eliminate excess emissions during SSM periods. These are steps which sources must undertake pursuant to section 63.6(e)(1)(i), which requires sources to minimize emissions at all times, including periods of SSM, consistent with safety and good air pollution control practices.

Intervenors suggest that there will be dire consequences if they are liable for excess emissions during periods of startup, shutdown, and malfunction. Respondent-Intervenors' Pet. at 12-14; NEDA-CAP's Pet. at 12-14. EPA recognizes that, despite their best efforts, some sources subject to section 112(d) standards that only cross-reference the exemptions in sections 63.6(f)(1) and (h)(1) may be unable to comply with such standards during SSM events. However, the dire consequences predicted by the industry groups have not materialized under the Clean Air Act's State Implementation Plan ("SIP") enforcement efforts. It has long been EPA's policy that SIPs cannot allow a release from liability for excess emissions of criteria pollutants during SSM events.[4] Similarly, in the National Emission Standards for Hazardous Air Pollutants ("NESHAP") under 40 C.F.R. Part 61, there is no exemption for excess emissions during SSM events. The result has not been a massive amount of litigation over excess emissions during SSM events, nor have industrial sources experienced dire consequences under Part 61 or SIP provisions that follow EPA's SIP policy.

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[4] *See* "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," Memorandum from Steven A. Herman and Robert Perciasepe to Regional Administrators, Sept., 1999 (JA 0687-0696).

Therefore, the Panel's decision to vacate rather than remand sections 63.6(f)(1) and (h)(1) does not merit rehearing *en banc*.

D. The Mandate

Finally, Respondent-Intervenors ask the Court to stay the mandate. Respondent-Intervenors' Pet. at 15. However, the Court should not address the mandate in the context of a petition for rehearing, and should not address the mandate without giving all parties an opportunity to respond.

First, the rules contemplate a separate motion to stay the mandate, as do this Court's precedents. *See* Fed. R. App. P. 41(b), 41(d)(1); Cir. Rule 41(a)(2). *See also Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998) ("If EPA wishes to promulgate an interim treatment standard, the Agency may file a motion in this court to delay issuance of this mandate in order to allow it a reasonable time to develop such a standard."). In addition, the Court's April 9 Order provides for a response only to the petitions for rehearing *en banc*. A request to stay the mandate implicates different considerations from a petition for rehearing, and requiring a separate motion allows all parties a full opportunity to address the merits of such a request.

Second, Circuit Rule 41(a)(2) provides that a motion for stay of the mandate "shall not be granted unless the motion sets forth facts showing good cause for the relief sought" and "ordinarily will not extend beyond 90 days from the date the mandate otherwise would have issued." In their petition for rehearing, Respondent-Intervenors rely on general allegations of "severe disruptions to industrial sources" without presenting specific examples, and do not

specify a period of time for which the mandate should be stayed. Respondent-Intervenors' Pet. at 15. Thus, Respondent-Intervenors have not presented sufficient information upon which to decide whether a stay is appropriate.

Therefore, the Court should defer consideration of a stay of the mandate, unless and until a party files an appropriate motion seeking that relief. However, if the Court is inclined to rule on Respondent-Intervenors' request now, without the need for a separate motion, EPA requests that it be granted an opportunity to present to the Court its views on a stay.

Respectfully submitted,

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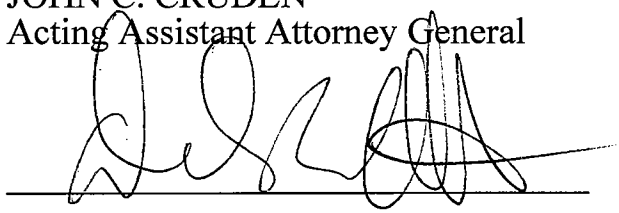

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May 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing EPA RESPONSE TO PETITIONS FOR REHEARING was served this 29th day of May, 2009, by U.S. mail, postage prepaid, on the following counsel:

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